

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANE SWINDALL CHAMBERS,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 254861

Macomb Circuit Court

LC No. 2003-002408-FC

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his sentence of eight to twenty years in prison imposed on his conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(c) (penetration occurs under circumstances involving commission of other felony). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of two counts of CSC I, one count of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1), and one count of first-degree home invasion, MCL 750.110a(2), as a result of an incident in which he broke into the home of the sixty-three-year-old complainant and sexually assaulted her. The statutory sentencing guidelines established a minimum term range of 108 to 180 months for CSC I. At sentencing the trial court, over defendant's objection, scored Offense Variable (OV) 10, MCL 777.40, exploitation of vulnerable victim, at ten points, and, without objection from defendant, scored OV 13, MCL 777.43, continuing pattern of criminal behavior, at twenty-five points. The trial court sentenced defendant to concurrent terms of eight to twenty years and seven to twenty years for CSC I, six years, eleven months to ten years for assault with intent to commit criminal sexual assault, and three years, two months to fifteen years for first-degree home invasion. Defendant received credit for 257 days served in jail.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. A scoring decision for which there is any evidence in the record will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The scoring of OV 10 at ten points is appropriate if the evidence showed that the defendant exploited the victim's "physical disability, mental disability, youth or agedness" MCL 777.40(1)(b). The term "exploit" means, "to manipulate a victim for selfish or unethical

purposes.” MCL 777.40(3)(b). The scoring of OV 13 at twenty-five points is appropriate if the evidence shows that the sentencing offense was “part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b).

No evidence showed that during the incident defendant learned that complainant suffered from heart problems; however, complainant testified that when defendant began to sexually assault her, she told him that she was an “old woman” and that he didn’t “want to do this,” but that defendant replied that he liked older women. The existence of a factor such as agedness, in and of itself, “does not automatically equate with victim vulnerability.” MCL 777.40(2). Nevertheless, the evidence supported a finding that complainant’s age factored into defendant’s decision to commit sexual assault. The evidence supported the trial court’s scoring of OV 10 at ten points. *Hornsby, supra*.

Defendant did not object to the trial court’s scoring of OV 13 at twenty-five points; therefore, we review his challenge to the scoring of that variable for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004). Defendant was convicted of four felonies involving crimes against a person. MCL 777.43(1)(b). He was scored zero points for OV 12, MCL 777.42, contemporaneous criminal acts; thus, no double scoring occurred. See MCL 777.43(2)(c). The trial court correctly scored OV 13 at twenty-five points for multiple felonies arising from the same incident. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

Evidence in the record supported the trial court’s scoring of OVs 10 and 13 at ten and twenty-five points, respectively. Therefore, we must uphold that scoring. *Hornsby, supra*. Defendant is not entitled to resentencing.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray